No. 88-7146 (1)

SEP 26

JOSEPH F. SPANIOL
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JONAS H. WESTMORE, INDIVIDUALLY
AND AS NEXT FRIEND OF
RONALD GENE SIMMONS ..... *Petitioner*

vs.

STATE OF ARKANSAS ..... *Respondent*

RONALD GENE SIMMONS, SR. ..... *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR THE RESPONDENT RONALD GENE SIMMONS, SR.

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ARKANSAS LEGISLATIVE DIGEST, INC.

QUESTIONS PRESENTED

I.

WHETHER THE EIGHTH AMENDMENT'S BAN AGAINST CRUEL AND UNUSUAL PUNISHMENT REQUIRES A MANDATORY APPELLATE REVIEW IN ALL CASES IN WHICH THE DEATH PENALTY IS IMPOSED.

II.

WHETHER A THIRD PARTY HAS STANDING TO ASSERT THE VIOLATION OF CONSTITUTIONAL RIGHTS WHEN THE PARTY DIRECTLY AFFECTED DOES NOT ASSERT THE RIGHT.

PARTIES TO THE PROCEEDINGS[1]

[1]The caption of the case does not contain the names of all of the parties. Is Ronald Gene Simmons, Sr., a party, or not? To remove any uncertainty about his status as a party in this matter, Simmons' attorneys filed with this Court a motion to have Simmons declared a party. Said motion was received April 1, 1989, in the Office of the Clerk of the Supreme Court of the United States. Simmons' lawyers thereafter received a letter from the U.S. Supreme Court Clerk's office dated April 5, 1989, which stated in part: "The motion to declare Ronald Gene Simmons a party for the purpose of filing a brief in opposition was received April 1, 1989, and is herewith returned as unnecessary." Again, a letter was received from the U.S. Supreme Court Clerk's office dated July 19, 1989, which stated in part: "By copy of this letter to all counsel, I am requesting that any future pleadings, correspondence, etc., filed in this case, that copies be served upon you as counsel for Ronald Gene Simmons. I am enclosing an Appearance Form for you to complete as counsel for Ronald Gene Simmons." On July 25, 1989, the Appearance Form, Supreme Court of the United States, No. 88-7146, was completed and filed with this Court by letter dated July 25, 1989. On August 2, 1989, Simmons' lawyers and lawyers for the respondent State of Arkansas mailed for filing a motion for additional time and for divided time for oral argument, and as of this time, the Court has not acted upon Simmons' motion requesting the opportunity to present oral argument in this case. Apparently, the Petitioner does not regard Ronald Gene Simmons, Sr., as a party in this case because Simmons' name as a respondent is continually omitted from the caption of the case in all of Petitioner's pleadings. Therefore, after all of this, the question still exists, "Is Ronald Gene Simmons, Sr., a party in this case? Will Ronald Gene Simmons, Sr., be afforded the opportunity to participate in oral argument in this case? Isn't Ronald Gene Simmons, Sr., the real party in interest in this case?" In conclusion, respondent Simmons contends that the caption of the case does not contain the names of all of the parties.

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BRIEF FOR THE RESPONDENT RONALD GENE SIMMONS, SR.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court in *Franz v. State* (Simmons I), reported at 296 Ark. 181, 754 S.W.2d 839 (1988), is reprinted in the Joint Appendix at page 4.

The opinion of the Arkansas Supreme Court in *Simmons v. State* (Simmons II), reported at 298 Ark. 193, 766 S.W.2d 422 (1989), is reprinted in the Joint Appendix at page 29.

The opinion of the Arkansas Supreme Court in *Simmons v. State* (Simmons II), reported at 298 Ark. 255, 766 S.W.2d 423 (1989), is reprinted in the Joint Appendix at page 34.

JURISDICTION

Article Three of the United States Constitution gives this Court jurisdiction over actual cases and controversies between ligitimate parties. This petitioner has no standing individually, and therefore seeks to gain next friend status of Ronald Gene Simmons, Sr., whose competency and age are not questioned; however, the incompetency of the petitioner is presently admitted. (See *Whitmore v. State*, 299 Ark. 55 [1989].) Therefore, this Court is without jurisdiction. *Gilmore v. Utah*, 429 U.S. 1012.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The First Amendment to the Constitution of the United States provides, in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property without due process of law . . .

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

During the evening hours of March 15, 1989, Ronald Gene Simmons, Sr., was eating his last meal. His execution was set for the next day at 7:00 a.m., the 16th day of March, 1989. The Respondent Simmons had previously been tried in two separate cases, convicted, and sentenced to death for capital murder of sixteen individuals, including fourteen family members. After each conviction and sentence of death, Respondent Simmons was fully advised by counsel of his right to appeal, potential grounds for appeal, and many other things concerning the appellate process. Respondent Simmons took the position that whether or not to appeal was a personal decision that could only be made by him, and it was his decision that the verdicts in the two previous cases were just and proper, and his only request was that the sentence be carried out without any delay; that life was cruel for him and he was suffering with it. Immediately after Respondent Simmons took this position, parties opposed to capital punishment, including a Catholic Priest and other death row inmates, came forward in both the Simmons I and the Simmons II cases, and attempted to intervene and delay these two proceedings in the following particulars: First, by claiming next friend status, and second, by asserting that the United States Constitution required a mandatory appeal in death penalty cases that cannot be waived by the defendant.

The trial court immediately gave these interlopers a hearing on their petitions, and also conducted a competency hearing to determine whether or not Respondent Ronald Gene Simmons, Sr., was competent and had knowingly and intelligently waived his right to appeal. After a full hearing on these matters, the trial court ruled that Respondent Ronald Gene Simmons, Sr., was competent, that he had in fact knowingly and intelligently waived his right to appeal, and as such, the petitioners would have no standing as next friend or otherwise,

and as a matter of law, there was no mandatory appeal that could not be waived by a competent defendant.

The trial court's decision in Simmons I was immediately appealed to the Arkansas Supreme Court; and the Arkansas Supreme Court, without any notice to Respondent Ronald Gene Simmons, Sr., and without any meaningful opportunity for him to be heard on the matter, granted the petitioners' request for stay of execution. However, ultimately, the Arkansas Supreme Court, after a full hearing on the matter, reversed themselves and lifted the stay of execution, and specifically found that Respondent Ronald Gene Simmons, Sr., was competent and had knowingly and intelligently waived his right to appeal; that the petitioners as such would have no standing as next friend or otherwise; and that the law of Arkansas and the Constitution of the United States of America do not require a mandatory appeal that cannot be waived by a competent defendant.

Immediately thereafter, the petitioners in Simmons I filed for a petition for writ of habeas corpus in Federal District Court contending essentially the same things, and again, the Federal District Judge, without any notice to Respondent Ronald Gene Simmons, Sr., and without any meaningful opportunity for him to be heard on the issue, granted a stay of execution. On September 23, 1988, Federal District Judge G. Thomas Eisele denied the petitioners' writ of habeas corpus "insofar as it attempted to assert any claim that Respondent Simmons may not make a knowing and intelligent waiver of any right he may have to state court appellate review by reason that petitioners do not have standing to assert such a claim, and this Court therefore lacks jurisdiction over such claim." In a hearing set for September 29, 1988, at 10:00 a.m., Mr. Simmons was brought before Judge Eisele for the purpose of ascertaining whether Simmons did in fact wish to waive further judicial review of his state court conviction and sentence, and on

September 29, 1988, Judge Eisele ordered Simmons committed to the custody of the Attorney General for a period of thirty days to be transferred to the Medical Center for Federal Prisoners at Springfield, Missouri, for a psychiatric observation and examination, during that period to determine Simmons' present competence to waive habeas corpus relief, with a report of the examinations to be filed with the Court promptly upon conclusion. On September 29, 1988, Judge Eisele entered an order appointing Attorney John Wesley Hall as an expert to review the state and federal records in Simmons' case, and to advise Simmons independently as to the merit of any arguments which might be made on Simmons' behalf. On October 18, 1988, Judge Eisele ordered the court reporter for the Circuit Court of Franklin County, Arkansas, to immediately undertake and complete the preparation of a transcript of all proceedings of record in that Court in connection with the trial of Simmons. On December 29, 1988, Judge Eisele ordered:

> The Court finds Simmons is competent to waive Federal habeas corpus review of his conviction and sentence. After court-appointed expert informs the Court of his completed review, the Court will order Mr. Simmons' return to Little Rock to confer with the expert. Thereafter a hearing will be held to give Mr. Simmons the opportunity to make a knowing and intelligent waiver of his rights to habeas corpus review.

On March 8, 1989, Judge Eisele ordered Simmons to confer with the Court-appointed expert, John Wesley Hall, on the morning of 3-9-89, at the Federal Courthouse in Little Rock. The Judge further ordered:

> A hearing will be held at 1:30 p.m., at which time Mr. Hall and Mr. Simmons will report upon their conference, and Mr. Simmons shall make known his desires as to waiver of federal review of his state court conviction.

On March 9, 1989, Judge Eisele ordered, on the basis of the findings and conclusions stated in open court:

> The petition for habeas corpus is dismissed. The temporary stay of execution filed on 8-3-88 is dissolved and set aside.

On February 28, 1989, attorney John Wesley Hall, Jr., the expert appointed by Judge Eisele, after reviewing the complete transcript of the case and visiting personally with Mr. Simmons, filed his report. Said report does not indicate any basis for ineffective assistance of counsel, and in reviewing the psychiatric and psychological evaluation filed with the court of 11-29-88, and other matters before the Court, Judge Eisele found Mr. Simmons competent to waive federal habeas corpus review of his conviction and sentence.

On February 10, 1989, the Simmons II trial was held, and a Johnson County jury convicted Simmons of capital murder and sentenced him to death by lethal injection to be carried out on March 16, 1989, at 7:00 a.m. Following the trial, Mr. Simmons notified the trial judge of his desire to waive his appeal, and after an evidentiary hearing held on March 1, 1989, the trial judge found that Simmons was competent to waive his right to a direct appeal. In accordance with the Arkansas Supreme Court's decision in *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988), Simmons submitted to the Supreme Court of Arkansas a transcript of the lower court's proceedings along with his petition and request for expedited review. After careful review of those lower court proceedings, the Arkansas Supreme Court granted petitioner Simmons' request. After noting that the trial court considered and made a part of this proceeding the same psychological evaluations that were introduced in *Franz*, in addition the trial court added to the record the forensic evaluation which was filed in a proceeding before the United States District Court, Eastern District of

Arkansas, and the court further found that the trial judge and Simmons' counsel performed an exceptional job in examining and exploring Simmons' capacity to understand the choice between life and death and his ability to know and to intelligently waive any and all rights he might have in an appeal of his sentence. In addition, Simmons' counsel thoroughly discussed seven possible points that could be argued for reversal on appeal, and Simmons responded by stating he understood those points and that he rejected all encouragement and suggestions to appeal. *Simmons v. State*, 766 S.W.2d 423, Ark. (1989).

After this last ruling, as mentioned earlier, Respondent Ronald Gene Simmons, Sr., was enjoying his last meal on the 15th day of March, 1989, prior to being executed at 7:00 a.m. on the following morning, when he happened to notice the monitor on the TV in the room, a news flash that the U.S. Supreme Court had stayed his execution pursuant to an application for stay of execution pending petition for writ of certiorari to the Supreme Court of Arkansas, filed herein by Petitioner Jonas H. Whitmore, individually and as next friend of Ronald Gene Simmons. This stay of execution by the U.S. Supreme Court was granted without any notice to respondent Ronald Gene Simmons, Sr., and without any meaningful opportunity for him to be heard on the issue.

Subsequent to that ruling by the High Court, the petitioners in Simmons I filed a notice of appeal to the 8th Circuit Court of Appeals, and thereafter, filed a motion for stay of proceedings pending the outcome in the Simmons II case that is presently before the U.S. Supreme Court. The State of Arkansas, through its Attorney General's office, filed a response essentially acquiescing that the proceedings in the 8th Circuit Court of Appeals in Simmons I should be stayed pending the outcome of Simmons II before this court, and again, without any notice to Respondent Ronald Gene

Simmons, Sr., and without any meaningful opportunity for him to be heard, the 8th Circuit Court of Appeals issued its order staying all of those proceedings pending the outcome of Simmons II before the U.S. Supreme Court.

On July 3, 1989, the U.S. Supreme Court granted writ of certiorari. On April 1, 1989, Simmons filed a motion to be declared a party in the proceedings, which the Clerk later ruled was unnecessary, and on August 2, 1989, Simmons and the attorneys for the State of Arkansas filed a joint motion requesting additional time and an opportunity for Simmons to participate in the oral argument so that his personal interests can be asserted prior to final resolution of this matter.

SUMMARY OF ARGUMENT

The bulk of petitioner's argument is grounded in three cases, *Gregg v. Georgia*, 428 U.S. 153, 1976; *Jurek v. Texas*, 428 U.S. 262, 1976; and *Proffitt v. Florida*, 428 U.S. 242, 1976. But what petitioner fails to recognize is that a later case is more clearly decisive on the question of mandatory appeal, and that case is *Gilmore v. Utah*, 429 U.S. 1012, 1976.

Petitioner attempts to characterize Arkansas as the only state with a death penalty statute which does not by statute or case law mandate a non-waivable appellate review of either the conviction or the sentence imposed. However, the only case going before the Supreme Court on this question was *Gilmore*. Therefore, it is not clear whether any state in the nation has a mandatory appeal that cannot be waived by a competent defendant. Certainly, Arkansas has no prohibition against a waiver if it is by a competent defendant who has made a knowing and intelligent waiver under safeguards enumerated by the law of the state.

Simmons does not believe that the Arkansas death penalty statute is subject to being arbitrarily and capriciously imposed, and he does not assert that it is in his case. However, the numerous safeguards that are built into the statutory scheme in Arkansas could better be addressed by the respondent State of Arkansas in its brief. Simmons would suffice to say that as a matter of fact, it has not been subject to being arbitrarily and capriciously imposed in the State of Arkansas for the past twenty-six years, because no one has been executed in Arkansas during that period of time.

Allowing a waiver of appellate review in capital cases under certain conditions is not contrary to public policy or adverse to the rights of society. For the prisoner convicted and condemned by society and restrained in a tiny cell with

practically no freedom, the option of termination of appeals and being executed may represent the only opportunity to exercise any personal choice in order to affect his or her fate. For the abolitionist, this may be the most difficult aspect of the problem, for granting the condemned person the right to bring on death affronts their belief in the sanctity of human life. But what must be remembered at all times is that the life involved is the life of the prisoner. It is his or her life at stake, his or her personal autonomy, and not that of the abolitionist. (Quoting from Urofsky, *A Right to Die, Termination of Appeal for Condemned Prisoners*, Vol. 75, No. 3, The Journal of Criminal Law and Criminology, 553, 1984.)

Petitioner Whitmore does not have standing on any of the traditional grounds, and he has failed to even allege grounds for standing. Instead he asks this Court to grant an exception and relax the requirements for standing so that the Court may address what petitioner characterizes as the abridgement of societal rights, and to remedy it, he says this Court should grant standing to any citizen. To this, respondent Simmons would argue that in the first place, societal rights are not being abridged but are being served in this case; secondly, the petitioner has no standing in this matter; and thirdly, citizens generally should not be able to acquire standing as next friend or otherwise in cases of this nature unless some bases exist for their claims. To relax the standards as requested by the petitioner would be to enlarge the jurisdiction of this Court in direct violation of Article Three of the United States Constitution opening the door to allow any citizen in any capital case to intervene and thwart the workings of the Court by claiming next friend status.

ARGUMENT

IA

WHETHER THE EIGHTH AMENDMENT'S BAN AGAINST CRUEL AND UNUSUAL PUNISHMENT REQUIRES A MANDATORY APPELLATE REVIEW IN ALL CASES IN WHICH THE DEATH PENALTY IS IMPOSED.

In *Whitmore v. State*, 299 Ark. 55 (1989), Justice Tom Glaze writing for the majority said:

> [1] The Whitmore and Simmons cases are further examples of a chain of Arkansas cases that reveal how the state and federal judicial systems have permitted applications for post-conviction remedies to get out of control. . . .

Whitmore's Rule 37 petition here and his intervention in the Simmons case, now pending in the United States Supreme Court, depict only one of the problems — albeit an absurd one — that the courts face when attempting to bring an end to criminal cases once they are launched into the procedural appellate and post-conviction maze. In his post conviction petition now before us, Whitmore claims that he did not receive a fair trial, because, among other things, his trial attorney was ineffective. In support of his argument, he contends his trial counsel failed to present available evidence that Whitmore had a diminished capacity when he killed his victim. Whitmore also points to his lengthy psychiatric history as well as to his alcoholism and incest and sexual abuse that occurred in his family. In sum, Whitmore objects that his trial counsel made no use of Whitmore's psychiatric evidence to show either diminished capacity as to his guilt or mitigating circumstances at the penalty phase. Further,

Whitmore contends that he is presently insane. In pursuing his petition before the United States Supreme Court, Whitmore makes no mention whatsoever of his pending petition in this court and the diminished capacity claims that he asserts in the petition.

Obviously, if Whitmore has a diminished capacity or psychiatric problem, how can he have standing to intervene in behalf of Simmons? In *Rees v. Peyton*, 384 U.S. 312 (1966), the Supreme Court held that if a defendant is determined to be competent, then a next friend has no standing to pursue further proceedings when the defendant chooses not to proceed. *See Gilmore v. Utah*, 429 U.S. 1012 (1976), where the Supreme Court reversed the record bearing on Gilmore's competency and decided his mother did not have standing to speak for him. Here a state trial court, this court, and a federal district court have either ordered psychiatric examinations or reviewed those examinations and have concluded Simmons has the capacity to waive his right to appeal or refuse to pursue any claims he may have. Nonetheless, the United States Supreme Court has allowed Whitmore, who has placed his own mental capacity in issue in a pending state proceeding, to intervene on behalf of Simmons so that Whitmore can argue claims Simmons steadfastly waives and refuses to raise. If the judicial system is to maintain integrity, we can ill afford to permit such a willful and improper manipulation of post-conviction procedures by a defendant.

The case before this Court could more accurately be captioned as, *"Abolitionists vs. Capital Punishment."* The arguments advanced by the petitioner, and many of the responses brought on by necessity by the respondents, in reality will have very little to do with Mr. Whitmore or Mr. Simmons. It would appear that they may not be relevant to these proceedings, and a question still remains whether Mr.

Simmons is a party, and if he is a party or not, will he be able to argue his side in this matter. If Simmons were allowed to argue these weighty notions raised by petitioner, Simmons' argument would be that common sense should prevail; that the Court should go back to the basics of stare decisis, because both of the points raised by petitioner, mandatory appeal and standing, have heretofore been decided against petitioner in a single case, *Gilmore v. Utah*, 429 U.S. 1012 (1976). The bulk of petitioner's argument is grounded in three cases: *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); and *Proffitt v. Florida*, 428 U.S. 242 (1976). But what petitioner fails to recognize is that a later case is more clearly on point, as determinative of the issues that petitioner wants to raise on this appeal. That case is *Gilmore*, which should be binding precedent that anyone else could follow and rely upon. The only distinction between the *Gilmore* case and the *Simmons* case is that the petitioner does not question Simmons' competency, and could not, since Mr. Simmons' competency has been determined recently by three independent court evaluations. *Simmons v. State*, 766 S.W.2d 423 (Ark., March 10, 1989).

Petitioner contends that *Gilmore* is not dispositive of the issue of mandatory appeal but is instead relevant only to the issue of third party standing.

Gilmore was a landmark decision. The abolitionists had been successful in abolishing capital punishment for a decade or more, and then Gilmore came along, willing to waive his rights to appeal his conviction, willing to waive any flaws in the trial procedures below, willing to waive even the constitutionality of a statute under which he was convicted, at a time when there were serious questions about the constitutionality of the Utah statute, and even some concern about Gilmore's competency. In spite of this, the U.S. Supreme Court allowed Mr. Gilmore to forego any appeal of his conviction, and in fact, be executed. Now the petitioner

contends that the Arkansas Supreme Court and the respondent State of Arkansas have misinterpreted both the issues of *Gilmore* and its precedential value on the question of mandatory appeal.

After a full reading of the text of the *Gilmore* decision, the only basis for petitioner's argument in that regard is Chief Justice Burger's comments:

> In his dissenting opinion, Mr. Justice White suggests that Gary Mark Gilmore is unable, as a matter of law, to waive the right to state appellate review. Whatever may be said as to the merits of this suggestion, the question simply is not before us. Gilmore, duly found to be competent by the Utah courts, has had available meaningful access to this Court, and has declined expressly to assert any claim here, other than his explicit repudiation of Bessie Gilmore's effort to speak for him as next friend. It follows therefore that the Court is without jurisdiction to consider the question posed by the dissent.

When Chief Justice Burger said the question (of mandatory appeal) is simply not before us, is perhaps subject to different interpretations. Petitioner's interpretation is that the *Gilmore* case is not dispositive on the issue of mandatory appeal. However, if the four Justices dissenting could have mustered one more Justice on their side of the argument, the holding of the case would have been that Gary Mark Gilmore was unable as a matter of law to waive the right to state appellate review, and the petitioner's argument then would have been that the *Gilmore* case is totally dispositive of the issue of mandatory appeal, and is good precedent and should be followed.

There is yet another argument why the *Gilmore* case *is* dispositive on the issue of mandatory appeal. Mr. Chief Justice

Burger writing for the majority said:

> After examining with care the pertinent portions of the transcripts and reports of state proceedings, and the response of Gary Mark Gilmore filed on December 8, I am in complete agreement with the conclusion expressed in the Court's order that Gary Mark Gilmore knowingly and intelligently, with full knowledge of his right to seek an appeal in the Utah Supreme Court, has waived that right.

Question: How can you waive that right to appeal if "the Eighth Amendment's ban against cruel and unusual punishment requires a mandatory appellate review in a death penalty case which cannot be waived by the defendant"? The majority decision in the *Gilmore* case in determining that he had waived his right to appellate review is stating, at least by implication, that the Constitution allows for such a waiver. If the majority felt otherwise, they could have denied Gilmore's attempted waiver, with or without Bessie Gilmore's next-friend application. So the *Gilmore* case is not just a question of standing as advocated by the petitioner. It is binding precedent on the question of mandatory appeal and it is good precedent on the issue of standing, and to this day, the *Gilmore* decision has never been overruled. It reflects contemporary standards of decency in our changing society by recognizing that even a murderer has certain rights and dignities, and freedom of choice, and that no third party, no matter how noble their intentions, should be allowed to decide what course of action is best for a particular individual, notwithstanding that individual's contrary views.

IB

A MANDATORY APPELLATE REVIEW OF DEATH PENALTY CASES IS NOT NECESSARY TO REFLECT CONTEMPORARY STANDARDS OF DECENCY.

Petitioner blatantly states that "Arkansas is the only state with a death penalty statute which does not by statute or case law mandate a non-waivable appellate review of either the conviction or the sentence imposed." This assertion, although unfounded and not properly documented, begs the question. The question is, "Can any state, by statute, case law, or otherwise, mandate a non-waivable appellate review of either the conviction or the sentence imposed in a death penalty case?", and the only answer is, that Utah did not in 1976. See *Gilmore*. Respondent Simmons would dispute the assertion that these other states have mandatory appeals that cannot be waived in a death penalty case, and even if they did have such a rule, it could not be asserted as petitioner is attempting to do so, until such time as that state's rule were tested before the U.S. Supreme Court for its constitutionality. Respondent Simmons is not aware of any of these other states referred to by petitioner as ever having gone before the U.S. Supreme Court to uphold the constitutionality of such a mandatory rule, and respondent Simmons would contend that if and when one of those states has a proper occasion to test any purported mandatory appeal, the U.S. Supreme Court will strike the rule down as being unconstitutional to a capital defendant, as being violative of a capital defendant's constitutional rights, of religion under the First Amendment, of the right of privacy in the "liberty" protected by the due process clause of the Fifth and Fourteenth Amendments and possibly the Ninth Amendment conceived as a rule against cramped construction, or from the privileges and immunities clauses of Article IV and of the Fourteenth Amendment. Encompassing rights to shape one's inner life and rights to control the face one presents to the world, they

have materialized like holograms from the "amanations" and "penumbras" most recently dubbed the "shadows of the First, Third, Fourth, and Fifth Amendments". They elaborate the "blessings of liberty" promised in the Preamble, and have been held implicit in the Eighth Amendment's prohibition against cruel and unusual punishments. (Quoting in part from Professor Tribe, p. 613, *Southern California Law Review*, Vol. 54.)

IC

WHETHER THE ARKANSAS DEATH PENALTY STATUTE IS SUBJECT TO BEING ARBITRARILY AND CAPRICIOUSLY IMPOSED IN THE ABSENCE OF MANDATORY APPELLATE REVIEW.

Simmons does not believe that the Arkansas death penalty statute is subject to being arbitrarily and capriciously imposed, and he does not assert that such is the case. Simmons believes that the respondent State of Arkansas can better address this point being raised by petitioner, because respondent State of Arkansas is more familiar with all of the procedures and safeguards that are included in the statutory scheme for administering the death penalty than is respondent Simmons.

However, Simmons would contend that the Arkansas death penalty statute has not been subject to being arbitrarily and capriciously imposed in the absence of mandatory review for the past twenty-six years, because as a matter of fact, no one has been executed in Arkansas for the past twenty-six years, and according to a recent U.P.I. release from the Bureau of Justice statistics, an arm of the Justice Department, it is reported that only twenty-five people were executed in eight states in 1987, the most since the Supreme Court reinstated the death penalty in 1976, and as of December 1, 1988, a record of 1,984 offenders were on death row in thirty-four states.

Obviously from these statistics, capital punishment has not been arbitrarily and capriciously imposed in Arkansas or in the nation in the absence of mandatory appellate review.

ID

ALLOWING A WAIVER OF APPELLATE REVIEW IN CAPITAL CASES UNDER CERTAIN CONDITIONS IS NOT CONTRARY TO PUBLIC POLICY OR ADVERSE TO THE RIGHTS OF SOCIETY.

In Urofsky, *A Right to Die: Termination of Appeal for Condemned Prisoners*, Vol. 75, No. 3, *The Journal of Criminal Law & Criminology*, 553, 1984:

> Although the death sentence is "qualitatively different from a sentence of imprisonment" as the Supreme Court has recognized, the doctrine of waiver in this area is derived substantially from general rules of waiver in criminal cases. Under early common law doctrine, an accused could not waive any rights intended for his protection. Later, he was allowed to waive those personal to himself, but not those in which the state maintained an interest. Currently, if there is no constitutional or statutory prohibition, or any public policy involved, an accused may waive any privilege. (See *Schick v. United States*, 195 U.S. 65, 71 [1904].) Page 562 . . .

If it is agreed that current law allows condemned prisoners to terminate their appeals, it must nonetheless be noted that opponents of capital punishment believe that they should not be allowed to do so. The most common argument is that acquiescence in the sentence amounts to state-abetted suicide. In his dissent in *Bishop*, Justice Marshall, who has consistently argued, albeit unsuccessfully so far, that the death sentence is unconstitutional under the Eighth Amendment, charged that

> "the Court has permitted the State's mechanism of execution to be triggered by an entirely arbitrary factor: the defendant's decision to acquiesce in his own death. In my view, the procedure the Court approves today amounts to nothing less than state-administered suicide." For abolitionists, the death penalty is "no less [barbarous] on those occasions when a murderer welcomes his own legal execution" than when the prisoner involuntarily goes to death. . . . For an abolitionist, there is apparently no middle ground; any execution by the state must be resisted. Pp. 565-566.

If one looks more closely at these arguments and examines them in the light of both legal and ethical considerations, their surface logic fails. First, ever since Gary Gilmore ended a ten-year moratorium on executions in this country, each new execution has brought dire warnings of an impending national bloodbath. Certainly with nearly thirteen hundred persons on death row and a net addition of approximately one hundred each year, the nation would have to execute ten persons a week for three years just to catch up with the backlog. But the facts show that despite indications of a growing dissatisfaction with endless appeals, the courts continue to insist on individualized evaluations of each case. Even Bedau concedes that the "avalanche" has failed to materialize. Unless and until firm evidence is presented that voluntary termination of appeal does in fact affect the rights of other prisoners, there should be no restrictions on these persons that prevent them from exercising their rights. Page 567 . . .

If, as the abolitionists argue, capital punishment is an inhumane deprivation of rights as well as a degradation of the individual, then why should not death row inmates be allowed — if they themselves so choose — to accept their punishment with dignity? It is certainly ironic that

in the *Gilmore* case, the American Civil Liberties Union passionately fought to prevent the execution of a convicted murderer who wished to die, claiming that Gilmore had no right to do so. It then turned around and argued that a right to die existed for Karen Ann Quinlan, who was unable to express her wishes one way or the other. Page 568 . . .

The Supreme Court has never addressed the issue of suffering attached to the death sentence aside from the actual mode of execution, and that case came down in 1890 when the Court approved the use of the electric chair. Punishments are cruel, held the Court, "when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies something inhuman and barbarous, something more than the mere extinguishment of life." Not until 1958, in a non-death penalty case, did the Court hold that a person's humanity must be respected regardless of guilt or crime. Abolitionists consider capital punishment in itself violative of the Eighth Amendment, but even those who favor the death penalty ought to concede that months or years on death row is certainly "more than the mere extinguishment of life." If one is going to argue that even condemned murderers retain some spark of humanity, some rights of individual autonomy, then something must be done to either improve death row conditions, or permit those who wish to terminate that existence through execution of sentence the right to do so. Page 573 . . .

For the prisoner, convicted and condemned by society and restrained in a tiny cell with practically no freedom, the option of terminating appeals and being executed may represent the only opportunity to exercise any personal choice in order to affect his or her fate. For the abolitionists, this may be the most difficult aspect of the

problem, for granting the condemned person the right to bring on death affronts their belief in the sanctity of human life. But what must be remembered at all times is that the life involved is that of the prisoner; it is his or her life at stake, his or her personal autonomy, and not that of the abolitionist. Pp. 578-579.

Quoting from Johnson, *The Death Row Right to Die: Suicide or Intimate Decision?* 54 Southern California Law Review, 575 (1981):

In order to be considered suicide, the victim must also actively set the death producing agent in motion. The terminal patient, to the extent that his physical condition results from natural causes and is not self-induced, certainly cannot be classified as suicidal because he refuses further treatment. Neither can the capital defendant, who may have committed murder for many other reasons, be said to have put *himself* on death row in an attempt at self-destruction. Society, represented by a jury of his peers, concluded that the prisoner deserved to die; he had no control over the outcome of their deliberations. Pp. 617-618.

What right does petitioner Jonas H. Whitmore have to unilaterally interject himself into Mr. Simmons' case and thereby deny Mr. Simmons the basic personal right of choice and to further subject Mr. Simmons to the prolonged agony and suffering brought about by these unreasonable and unwanted delays? The obvious answer is that Mr. Whitmore does not have that right.

In his brief, petitioner attempts to chastise Simmons' attorneys, trial judge, and perhaps by implication the Arkansas Supreme Court, Federal District Judge G. Thomas Eisele, and court-appointed expert, attorney John Wesley Hall, when petitioner raises these questions: "Who has informed Mr.

Simmons of trial error: his attorneys? Who advocates his death? The trial judge who, presumably, ruled on the questions of evidence? And who has informed Mr. Simmons as to whether he received effective assistance of counsel at the trial?" In raising these questions, petitioner ignores the apparent answers which are noted throughout the voluminous record that was established in both Simmons I and Simmons II.

Specifically, in Simmons I after the trial court had already conducted two or more hearings and declared Simmons to be competent and that he had knowingly and intelligently waived his rights to appeal, thereafter the Arkansas Supreme Court made its review, and determined that Simmons was competent and that he knowingly and intelligently waived his rights to appeal, but more particularly thereafter, Federal District Judge G. Thomas Eisele ordered Mr. Simmons to undergo additional psychiatrict evaluation at a federal institution and ordered a court clerk to prepare a complete transcript of the entire trial record and appointed attorney John Wesley Hall as an expert on constitutional criminal law, to review the entire record and meet with and counsel with Simmons to personally advise him independently of his rights to appeal and the grounds therefor, and his federal habeas corpus rights. Thereafter, Attorney Hall filed a very extensive seventy-four page report to advise respondent Simmons on appealable issues in his May 1988 death sentence, and nowhere in that report is there any finding of ineffective assistance of counsel, and Mr. Simmons has never asserted any ineffective assistance of counsel, and neither Federal District Judge G. Thomas Eisele, nor the Arkansas Supreme Court, nor the trial court below has ever found any basis for ineffective assistance of counsel.

In *Simmons v. State of Arkansas*, 766 S.W.2d 423 (Ark. 1989), the Arkansas Supreme Court stated in its per curiam order:

> The trial judge and petitioner's (Simmons') counsel performed an exceptional job in examining and exploring the petitioner's capacity to understand the choice between life and death and his ability to know and to intelligently waive any and all rights he might have in an appeal of his sentence. In addition, petitioner's counsel thoroughly discussed seven possible points that could be argued for reversal on appeal, and petitioner responded by stating he understood those points and that he rejected all encouragement and suggestions to appeal.

In *Lenhard v. Wolff*, 603 F2d 91 (1979), the Court held that court-appointed counsel had no standing as an accused's next friend to file petition for writ of habeas corpus and application for stay of execution of sentence imposed on accused in the absence of some showing that accused lacked capacity to pursue relief in federal court; and, in *Hamblin v. State of Florida*, 527 So.2d 800 (1988), the court held:

> Hamblin had a constitutional right to represent himself, and he was clearly competent to do so. To permit counsel to take a position contrary to his wishes through the vehicle of guardian ad litem would violate the dictates of *Faretta*. In the field of criminal law, there is no doubt that "death is different," but, in the final analysis, all competent defendants have a right to control their own destinies.

"Generally, there is no constitutional right to appeal a conviction." See *McCain v. Durston*, 153 U.S. 684 (1894). This cited authority appears in the recent case of *Murray v. Giarratano*, ___ U.S. ___ (88-411, June 23, 1989). Therefore, if there is presently no constitutional right to appeal a conviction, how can there be a constitutional prohibition against waiving an appeal?

II

WHETHER A THIRD PARTY HAS STANDING TO ASSERT THE CONSTITUTIONAL RIGHTS WHEN THE PARTY DIRECTLY AFFECTED DOES NOT ASSERT THE RIGHT?

Petitioner Whitmore does not have standing on any of the traditional grounds, and he has failed to even allege grounds for standing. Instead, he asks this Court to grant an exception and relax the requirements for standing so that the Court may address what petitioner characterizes as the abridgement of societal rights, and to remedy this, he says this Court should grant standing to any citizen. To this, respondent Simmons would argue that in the first place, societal rights are not being abridged, but are being served in this case. Secondly, the petitioner has no standing in this matter; and thirdly, citizens generally should not be able to acquire standing as next friend or otherwise in cases of this nature, unless some bases exist for their claims. To relax the standards as requested by the petitioner would be to enlarge the jurisdiction of this Court in direct violation of Article Three of the United States Constitution. And if petitioner Whitmore were granted standing in this case, the Court would be opening the door to allow any citizen in every capital case to intervene and thwart the workings of the Court by claiming next friend status.

Also, to grant petitioner next friend status in the Simmons case, this Court would clearly have to overrule the findings in the Gilmore case, because even the petitioner cites the Gilmore case as being controlling authority on the question of standing. In *Gilmore*, Mr. Chief Justice, writing for the majority stated:

> When the application for a stay was initially filed on December 2, a serious question was presented as to whether Bessie Gilmore had standing to seek the requested relief or any relief from this Court. Assuming the Court would otherwise have jurisdiction with respect to a "next friend" application, that jurisdiction would arise only if it were demonstrated that Gary Mark Gilmore is unable to seek relief in his own behalf. See *Rosenberg v. United States*, 346 U.S. 273, 291, 97 L.Ed. 1607, 73 S. Ct. 1152 (1953) (separate opinion of Jackson, J., joined by five Members of the Court). However, in view of Gary Mark Gilmore's response on December 8, 1976, it is now clear that the "next friend" concept is wholly inapplicable to this case. Since Gary Mark Gilmore has now filed a response and appeared in his own behalf, through his retained attorneys, any basis for the standing of Bessie Gilmore to seek relief in his behalf is necessarily eliminated.

Petitioner also claims to be a citizen of the State of Arkansas, but offers no proof on this point other than the allegation that he is presently confined on death row in Arkansas prisons. Respondent Simmons would contend that petitioner Whitmore is not a citizen of the State of Arkansas, and where petitioner Whitmore claims to have standing to assert a constitutional violation as it directly involves rights afforded to him by the State of Arkansas and his interest to have the Simmons case in the data base for comparative review in his death penalty case, respondent Simmons would contend that petitioner Whitmore has already had his case affirmed on direct appeal (*Whitmore v. State*, 296 Ark. 308 756 S.W.2d 890 [1988]), and further, has had his Rule 37 petition denied (*Whitmore v. State*, 299 Ark. 55 [1989]). Also see *Pulley v. Harris*, 465 U.S. 37, 79 L.Ed.2d 29, 104 S. Ct. 871 (1984), where this Court held:

> There is thus no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it. Indeed, to so hold

would effectively overrule *Jurek* and would substantially depart from the sense of *Gregg* and *Proffitt*. We are not persuaded that the Eighth Amendment requires us to take that course.

Quoting from Johnson, *The Death Row Right to Die: Suicide or Intimate Decision?* 54 S. Cal. Law Review, 575 (1981):

> Although next friend proceedings have been specifically approved in cases of infancy, incompetency, or lack of time, the death row inmate's desire to be executed, coupled with his refusal to appeal, cannot alone confer standing upon a next friend that a party would not ordinarily have under recognized principles. A showing of the capital defendant's incompetence must be made. (See *Gilmore*) . . .
>
> When the date of execution is imminent, next friends will usually be successful in obtaining temporary stays of execution, pending a determination of the defendant's competency and ability to represent his own interests. Such a stay, however, will not be continued after the condemned prisoner has been found competent to waive appellate review of his death sentence. (Citing *Lenhard v. Wolff*), Pp. 584, 585.

Next friends will usually be successful in obtaining TEMPORARY STAYS OF EXECUTION, and here lies the problem for the death row inmate, the state, society, victims of crime, and the public generally who believe in the fair and expeditious enforcement of capital punishment. In the past, not by law, but by practical application, a temporary stay has been virtually automatic upon the request of anybody claiming, rightly or wrongly, next friend status, and with the apparently endless cycle of appellate litigation on capital

cases, a temporary stay can easily translate into a decade or more, but the worst evil of this procedure has never been addressed, and probably never will, because it is always a moot question. The question is, "What remedy, if any, does a death row inmate have when his constitutional rights are violated by some interloper claiming next friend status?" Clearly, petitioner Whitmore could not have taken Simmons' car or any of his property, liberty, or life, without due process of law under the Fifth Amendment of the United States Constitution. Due process of law is generally considered to be notice and a reasonable opportunity to be heard before the action is taken against you. In every instance in this case where the court has granted a stay of execution, first the Arkansas Supreme Court; second Federal District Court; third the Eighth Circuit Court of Appeals; and fourth the U.S. Supreme Court; each and every time this was done to Mr. Simmons without any notice to Mr. Simmons, and without any opportunity for him or his attorneys to be heard on the question, and as a direct result of these unwanted stays of execution being granted, this has caused Mr. Simmons by his own admission to suffer unnecessarily in clear violation of his Eighth Amendment rights against cruel and unusual punishment. Each and every time Mr. Simmons attempted to complain about this in the court processes below, it was always disregarded as a moot question because the stay had already been granted. Surely now, before this Court of last resort, this Court will take cognizance of respondent Simmons' complaint about the violations of his constitutional rights as inflicted by petitioner Whitmore and others who have wrongfully characterized themselves as "next friends". There is precedent for a court addressing what would otherwise be classified as a moot question. *In re Estate of Brooks*, 32 Ill. 2d 361, 205 N.E.2d 435 (1965), in this "landmark case upholding a patient's right to refuse treatment on religious grounds, Mrs. Brooks, a Jehovah's Witness, refused to accept blood transfusions necessary for her survival on the ground that the tenets of her faith forbade such procedures.

Although transfusions had already been administered pursuant to the trial court's order, the Supreme Court of Illinois still chose to consider the issues involved as they were of substantial public interest. In condemning the trial court's action as a clear violation of the patient's religious freedom, the Illinois Supreme Court distinguished *Brooks* from other cases in which the state's interest in protecting the life of an unborn child, as well as in safeguarding the health and welfare of minor children, were sufficiently compelling to justify forced transfusions. Mrs. Brooks was not pregnant, had no minor children to care for, and did not, by her actions, present any 'clear and present danger' to society's welfare."

Respondent Simmons respectfully asks this Court to address this question in the case before it.

In *Rosenberg v. United States*, 346 U.S. 273 (1953),

> A total stranger to Julius and Ethel Rosenberg filed a next friend petition for stay of execution of the defendants' death sentences, which was temporarily granted. Justice Jackson, in a concurring opinion, discussed the potential for abuse inherent in next friend standing:
>
> "Every lawyer familiar with the workings of our criminal courts . . . will agree that this precedent presents a threat to orderly and responsible representation of accused persons and the right of themselves and their counsel to control their own cases. . . . That such disorderly intervention is more likely to prejudice than to help the representation of accused persons in highly publicized cases is self evident. We discountenance this practice."

In the present case, petitioner Whitmore has no standing to intervene, and this Court therefore is lacking in jurisdiction. And the question of mandatory appeal was decided in *Gilmore*

thirteen years ago, and it has never been overruled. Allowing a prisoner some degree of autonomy and dignity and personal choice in these matters is not against society's interest but in furtherance of it. Therefore, petitioner's request should be denied.

CONCLUSION

For the reasons and authorities cited above, the decision of the Arkansas Supreme Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John Harris, hereby certify that the annexed Brief for the Respondent Ronald Gene Simmons, Sr., has been timely filed, pursuant to Rules 30 and 35 of the Rules of this Court by sending a copy via first class mail, postage pre-paid, addressed to the Clerk of this Court.

I further certify that I served the said Brief on Petitioner by placing a copy in the United States Mail, postage prepaid, to: Arthur L. Allen, Attorney at Law, Allen & O'Hern, First Commercial Building, 400 West Capitol, Suite 1700, Little Rock, AR 72201; and that I served the said Brief on Respondent State of Arkansas by placing a copy in the United States Mail, postage prepaid, to: The Hon. Steve Clark, Attorney General of Arkansas, Tower Building, Suite 200, Fourth & Center Streets, Little Rock, Arkansas 72201, on the 22nd day of September, 1989.

/s/ John Harris
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Ronald Gene Simmons, Sr.